

James F. Halley, OSB 91175  
JAMES F. HALLEY, P.C.  
The Strowbridge Building  
735 SW First Ave.  
Portland, OR 97204  
503/295-0301; 503/228-6551 (fax)  
[jimhalley@halleylaw.com](mailto:jimhalley@halleylaw.com)

Attorney for Defendant Wesley Kjar

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY KJAR,

Defendant

No. 3:16-cr-00051-018-BR

MOTION FOR DISCOVERY:  
IDENTIFICATION OF DEFENDANTS'  
STATEMENTS TO BE OFFERED IN A  
JOINT TRIAL, AND FOR PRODUCTION  
OF REDACTED VERSIONS OF THOSE  
STATEMENTS

I. CERTIFICATE OF COMPLIANCE WITH CONFERRAL ORDER.

Counsel has conferred with AUSA Ethan Knight by email regarding this motion, requesting identification of co-defendant statements to be offered at a joint trial, and production of copies of those statements redacted in a manner consistent with *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Mr. Knight responded that the prosecution is unable to tell what statements it intends to offer at trial at this time, and so is not taking a position on this request at this time. The prosecution suggested this is a matter for a Round 2 motion.

Counsel for the defense contend that whether the government must identify co-defendant statements, and produce redacted versions of those statements, is a legal matter that should be addressed in Round 1. Whether the government's proposed redactions are adequate would then be an appropriate fact issue for a Round 2 motion.

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James F. Halley, P.C.  
Attorney At Law  
The Strowbridge Bldg. • 735 S.W. First Ave., 2d. Floor  
Portland, OR 97204-3326  
Tel: (503) 295-0301 Fax: (503) 228-6551

The initial legal matter of the obligation to identify and produce redacted copies should be resolved early so that the defense may timely evaluate severance or other fact based motions growing out of the statements the government intends to offer.

## II. DEFENDANTS WHO HAVE EXCEPTED THEMSELVES FROM THIS MOTION.

To counsel's knowledge, no defendant has asked to be excepted from this motion.

## III. MOTION.

Defendants respectfully move this Court for an order directing the prosecution to identify defendant statements it intends to offer in a joint trial, and to produce redacted versions of those statements so as to remove all reference to the other co-defendants and their existence. By this motion, the defense seeks not only those statements made by a defendant "in response to interrogation by a person the defendant knew was a government agent" (F.R.Crim.P. 16(a)(1)(A)), but also any other defendant statement the government intends to offer at trial.

The introduction in a joint trial of a non-testifying defendant's statement violates a co-defendant's Sixth Amendment right of cross examination and confrontation where the statement implicates a co-defendant. In *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 476, 88 S.Ct. 1620 (1968), the government offered the testimony of a Postal Inspector about co-defendant Evan's confession which named and inculpated Bruton. In finding that the admission of the statement violated Bruton's right to confrontation, the court wrote

there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect.... The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross examination.

*Id.* at 135-36 (citations omitted).

While the court may redact a non-testifying co-defendant's statement, that course is not without peril. In *Richardson v. Marsh*, 481 U.S. 200, 95 L.Ed.2d 176, 107 S.Ct. 1702 (1987), the court found that admission of a non-testifying co-defendant's statement, which had been redacted to eliminate all reference to Marsh and her existence, did not violate the Sixth Amendment. However, in *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed. 2d 294 (1998), the court found a Sixth Amendment violation where the court redacted a statement so as to remove all reference to Gray, but in place of those references substituted blanks and the word "delete".

Here, 26 defendants are set for a joint trial to begin on September 7, 2016. The trial of that many defendants in that short a period of time presents many logistical and evidentiary issues, one of which will be the admissibility of co-defendant statements. As a preliminary legal matter, the court should order the prosecution to identify the statements it intends to offer, and should also order the prosecution to produce redacted versions of those statements consistent with *Bruton*, *Richardson*, and *Marsh*, so that the parties can pursue fact based litigation over the admissibility of the statements.

Respectfully submitted April 27, 2016

JAMES F. HALLEY, P.C.  
/s/ James F. Halley  
 James F. Halley, OSB #911757  
 Attorney for Wesley Kjar